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Brief of Cist & Cleveland for D

SUPREME COURT OF THE UNITED STATES

Filed April 10, 1899.

THE CINCINNATI, HAMILTON & DAYTON RAILWAY COMPANY,
Plaintiff in Error,

versus

B. F. THIEBAUD, Administrator of the Estate of Chris. Sweetman, deceased,
Defendant in Error.

On a Certificate from the United States Circuit Court of Appeals for the Sixth Circuit.

Brief for Defendant in Error.

CHARLES M. CIST,
HARLAN CLEVELAND,
Counsel for Defendant in Error.

EDGAR W. CIST,
Of Counsel.

THE COURT INDEX PRESS.

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B. F. THIEBAUD, Administrator of Chris. Sweetman, deceased,
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Brief of Defendant in Error.

This was a suit for wrongful death. Decedent was a locomotive engineer of defendant and was killed in Indiana by the admitted negligence of defendant's servants, the engineer and conductor of another train. Plaintiff relied on the "Employers' Liability Act" of Indiana, and the Court charged that under that act defendant was liable, to which charge defendant excepted. Verdict and judgment for plaintiff. Defendant took the case by writ of error to the Circuit Court of Appeals for the Sixth Circuit, claiming that the action of the Court in charging the jury that defendant was liable under said act of Indiana was error for that said act contravened the Fourteenth Amendment of the Constitution of the United States and was therefore void. This

claim being pressed by defendant, plaintiff moved in the Circuit Court of Appeals to dismiss the case for want of jurisdiction, it being a "case in which it is claimed that a law of a state is in contravention of the Constitution of the United States," and therefore, under Section 5 of the Act of Congress of March 3d, 1891, the writ of error must be taken from the Supreme Court of the United States and not from the Circuit Court of Appeals.

Thereupon said Circuit Court of Appeals, desiring the instruction of this Court thereon, certified four questions arising upon said motion:

I.

The first question certified is:

"Has the Circuit Court of Appeals jurisdiction of a writ of error to the Circuit Court in a case in which it is claimed that a law of a state is in contravention of the Constitution of the United States, where the record presents other questions not involving the Constitution of the United States?"

We submit this question should be answered in the negative.

In *Wrightman* v. *Boone Co.*, 88 Fed., 435, which was a case in which it was claimed that a law of Arkansas was in contravention of the Constitution of the United States, the Court say:

"Section 5 of the act of March 3d, 1891, 26 Stat., 828, C. 517, declares that appeals may be taken to the Supreme Court (6) in any case in which the Constitution or law of a state is claimed to be in contravention of the Constitution of the United States. Section 6 provides that in cases other than those provided for in Section 5, the Circuit Court of Appeals may exercise appellate jurisdiction, unless otherwise provided for in Section 5, and consequently this Court has no jurisdiction of it. A careful examination of these sections of the act of Congress in *Hastings* v. *Ames*, 68 Fed., 726, and in *Pauley* v. *Crawford Co.*, 84 Fed., 942, led us to the conclusion that if it is claimed that a law of a state is void because it contravenes the Constitution of the United States, a Circuit Court of Appeals has no jurisdiction of the case, though it may involve the consideration of many other questions."

The same conclusion was reached by the Circuit Court of Appeals of the Seventh Circuit in the case of *Indianapolis* v. *Central Trust Co.*, 83 Fed., 529, in which case it was held (syllabus):

"But the further contention in support of said injunction that the statute was an impairment of a contract right to charge a higher rate of fare given plaintiff by the city ordinance under which it constructed its road involves the application of the contract clause of the Federal Constitution, and fixes exclusive jurisdicti n of an appeal in the Supreme Court."

And in the case of *Holt* v. *Manufacturing Co.*, 80 Fed., 1, in which case the Court say, at page 3:

"The question at issue is whether the statutes of the state of Indiana authorizing such taxation are repugnant to the Constitution of the United States. . . . . The statute provides that in such cases appeals or writs of error may be taken directly to the Supreme Court. The case falls within the classification of cases in Section 5 over which this Court has no jurisdiction upon appeal. It is urged that we should entertain the jurisdiction and certify the question of the validity of the laws of Indiana to the Supreme Court. That we can not do. If we have jurisdiction, we may decide the question without certifying it to the Supreme Court. If we have not jurisdiction, we can not acquire it by or assume it for the purpose of the discretionary act of certification. The decisions in *McLish* v. *Roff*, 141 U. S., 661; *Maynard* v. *Hecht*, 151 U. S., 324; *U. S.* v. *Jahn*, 155 U. S., 109; *In re New York & P. R. S. S. Co.*, 155 U. S., 523, 531; *In re Lehigh Min. & Manuf'g Co.*, 156 U. S., 322, 326; *Shields* v. *Coleman*, 157 U. S., 168, 176; *Colvin* v. *City of Jacksonville*, 157 U. S., 368—in which it was held that in cases where the jurisdiction of the lower Court is involved, the party 'must elect whether he will take of jurisdiction alone, or to the Circuit Court of Appeals upon the whole case; if the latter, then the Circuit Court of Appeals may, if it deem proper, certify the question of jurisdiction to this court'—have reference only to cases involving t e jurisdiction of the Court below, which are comprehended within the first subdivision of the fifth section of the act. They have no application to the other subdivisions of the section, which classify the cases in which the Supreme Court has jurisdiction upon appeal or writ of error. In those cases its juri-diction is exclusive. *Horner* v. *U. S.*, 143 U. S., 570, 576; *Carey* v. *Railway Co.*, 150 U. S., 170, 181; *Chappell* v. *U. S.*, 160 U. S., 499, 509; *Scott* v. *Donald*, 165 U. S., 58. The Circuit Courts of Appeals have jurisdiction only in cases other than those provided for in Section 5. This case is therefore one in which the jurisdiction of the Court below and the right to relief depended upon the question whether the laws of the state of Indiana, which sanctioned the taxation in question, were in contravention on the Constitution of the United States, and therefore a case arising under the Constitution or laws of the United States. It was so considered by the Court below, and relief was granted solely upon that ground. We are con-

strained to the conclusion that this Court has no jurisdiction of an appeal from that decree, and that the proper and only remedy of the appellants is by appeal to the Supreme Court of the United States. Appeal dismissed."

Also by the Circuit Court of Appeals for the Fifth Circuit in the case of *Hamilton* v. *Brown*, 53 Fed. 753. The Court say, page 757:

"We notice further, that in the statement of the case, and particularly in the assignment of errors, the case is shown to be one which involves the construction and application of the Constitution of the United States, as well as a case in which a law of the state of Texas is claimed to be in contravention of the Constitution of the United States. In the fifth section of the act of 1891, *supra*, it is provided 'that appeals or writs of error may be taken from the District Courts, or from the existing Circuit Courts, direct to the Supreme Court, in the following cases: . . . (4), In any case that involves the construction or application of the Constitution of the United States; . . . . (6), in any case in which the constitution or law of a state is claimed to be in contravention of the Constitution of the United States.' The sixth section of the said act gives appellate jurisdiction to the Circuit Court of Appeals to review by appeal or by writ of error, final decision in the District Courts and the existing Circuit Courts only in cases not provided for in the fifth section of the act. On either or both of the grounds mentioned, it would seem to be our duty to dismiss the appeal, and an order to that effect will be entered. Appeal dismissed."

The same view is expressed by the Circuit Court of Appeals for the Fourth Circuit in *Green* v. *Mills*, 69 Fed., 857.

To the same effect are:

Pauley Co. v. *Crawford Co.*, 84 Fed., 942.
Hastings v. *Ames*, 68 Fed., 726.
Barr v. *New Brunswick*, 72 Fed., 689.
Railway Co. v. *Evans*, 58 Fed., 433.
Macon v. *Georgia Packing Co.*, 60 Fed., 781.
Hamilton v. *Brown*, 53 Fed., 757.
U. S. v. *Sutton*, 47 Fed., 129.
Westerly v *Westerly Water-works*, 76 Fed., 467.
Mayor, etc., v. *City of Macon*, 60 Fed., 781.
Davis & Rankin Co. v. *Barber*, 60 Fed., 465.
Ry. Co. v. *Evans*, 58 Fed., 433.

These cases embrace rulings on the question by the Circuit Courts of Appeals of the First, Third, Fourth, Fifth, Seventh and

Eighth Circuits and no case is found in which any different conclusion has been reached.

This Court has repeatedly entertained jurisdiction in such cases.

In *Scott* v. *Donald*, 165 U. S., 258, the Court say:

"As the case is before us as a case in which the law of a state is claimed to be in contravention of the Constitution of the United States, we have jurisdiction of the entire case and of all questions involved in it. *Horner* v. *U. S.*, 570; *Carey* v. *Railway*, 150 U. S., 181; *Chappell* v. *U. S.*, 160 U. S , 499."

It is true that in a number of instances the Circuit Courts of Appeals have taken jurisdiction of cases in which it was claimed that a state law was in contravention of the United States Constitution, some of which cases have come to this Court on proceeding in error, but an examination of these cases will show that no question as to the jurisdiction of the Circuit Court of Appeals was anywhere raised, or that the attention of the Court was called to the fact that the jurisdiction did not exist. The point was overlooked as well by counsel as by the Court, and no question of jurisdiction was presented, much less contested. As was said by this Court in *Cross* v. *Burke*, 146 U. S., p. 87, the Court "does not consider itself bound by a view of its jurisdiction taken in a case where the question of jurisdiction does not appear to have been contested."

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In the case of *Snow* v. *U. S* , 346, the Court say:

"We conclude, therefore, that we have no jurisdiction of these writs of error, and that they must be dismissed for that reason.

"It is urged, however, that this Court took jurisdiction of the writ of error in *Cannon* v. *U. S.*, 116 U. S., 55, and affirmed the judgment under the same Section 3 of the act of 1882. The question of jurisdiction was not considered in fact in that case, nor alluded to in the decision, nor presented to the Court by the counsel for the United States, nor referred to by either party at the argument or in the briefs. Probably both parties desired a decision on the merits. The question was overlooked by all the members of the Court. But, as the case was decided at the present term, and the want of jurisdiction in it is clear, we have decided to vacate our judgment and recall the mandate, and dismiss the writ of error for want of jurisdiction, in order that the reported decision may not appear to be a precedent for the exercise of jurisdiction by this Court in a case of the kind."

In *Lau ow Bew* v. *United States*, 144 U. S., 56, the Court say:

"Under Section 5, appeals or writs of error may be taken from the Circuit Courts directly to this Court in six specified classes of cases, namely:

"(1), In any case in which the jurisdiction of the Court is in issue. In such cases the question of jurisdiction alone shall be certified to the Supreme Court from the Court below for decision. (2), From the final sentences and decrees in prize causes. (3), In cases of conviction of a capital or otherwise infamous crime. (4), In any case that involves the construction or application of the Constitution of the United States. (5), In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question. (6), In any case in which the Constitution or law of a state is claimed to be in contravention of the Constitution of the United States."

"By Section 6 the Circuit Courts of Appeals 'shall exercise appellate jurisdiction to review, by appeal or writ of error,' final decisions of the Circuit Courts, 'in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law.' The appellate jurisdiction not vested in this Court was thus vested in the Court created by the act, and the entire jurisdiction distributed."

Since the appellate jurisdiction which is *not* vested in the Supreme Court is the appellate jurisdiction thus vested in the Circuit Court of Appeals, it follows that the Circuit Court of Appeals has no jurisdiction in a case provided for by Section 5 of the act. The jurisdiction is distributed; it is not left to the option of a party to carry his case to either forum at his election. He is bound by the character of his case. And the character of the case is determined by the *criteria* specified in Section 5 of the act.

If the case necessarily involve the construction or application of the Constitution of the United States, then this Court has sole jurisdiction to determine all questions in the case, no matter in what form the constitutional question arises or is involved, whether it relate to the constitutionality of a law of the United States or of the Constitution or law of a state.

But Congress, not content with conferring exclusive jurisdiction upon the Supreme Court in cases which involved the construction and application of the Constitution of the United States, which would of course include a case involving the question whether a state Constitution or law was in contravention thereof,

went further and made a special provision for that particular class of constitutional questions—class 6 of Section 5.

In this special class a different test or criterion of jurisdiction is provided. The jurisdiction does not here depend upon whether a constitutional question is "*involved*," but upon the mere fact that *a claim is made* that the state Constitution or law contravenes the Federal Constitution. It is enough that the attack is made, that the state Constitution or law is in good faith impugned, to impress upon the case its character as one for the exclusive consideration of this Court.

This distinction has been recognized by this Court, as in *Muse* v. *Arlington*, 168 U. S., 430, and *Ansbro* v. *U. S.*, 159 U. S., 695, the Court has held that where the jurisdiction of the Supreme Court is invoked in cases within classes 4 and 5 of Section 5, the constitutional question must be *involved*, must require decision, and hence in cases which did not require the solution of the constitutional question, but could be determined on other grounds, the Circuit Court of Appeals, and not the Supreme Court, had jurisdiction, while in the cases of *Penn. Insurance Co.* v. *Austin*, 168 U. S., 685, and *Holder* v. *Aultman*, 169 U. S., 81, arising under class 6 of Section 5 of the act, this Court took jurisdiction by reason of the claim made in the case that the state law contravened the Constitution of the United States, although it was not found necessary to pass upon such claim and the cases were determined on quite other grounds, the only questions decided in the cases raising no constitutional issues.

II.

The second question is:

"Has the Circuit Court of Appeals jurisdiction of a writ of error to the Circuit Court in a case in which it is claimed that a law of a state is in contravention of the Constitution of the United States, where the record presents other questions not involving the Constitution of the United States, which might require a reversal of the judgment without reference to the constitutional question?"

We submit that this question should likewise be answered in the negative.

In *Penn. Insurance Co.* v. *Austin*, 168 U. S., 685, this Court upheld its jurisdiction in a case in which it was claimed that certain laws of Texas contravened the Constitution of the United States, although this claim not only did not present the sole question in the case, but as a matter of fact, it was not found necessary to decide the constitutional question, this Court affirming the judgment of the Circuit Court on the ground of laches of plaintiff in error in asserting his rights.

To the same effect is *Holder* v. *Aultman*, 169 U. S., 81, in which the Court say:

"This was a case in which the law of a state is claimed to be in contravention of the Constitution of the United States, and was rightly brought directly to this Court by writ of error under the act of March 3, 1891, C. 517, Section 5, 26 Stat., 828. Upon such a writ of error, differing in these respects from a writ of error to the highest Court of a state, the jurisdiction of this Court does not depend upon the question whether the right claimed under the Constitution of the United States has been upheld or denied in the Court below; and the jurisdiction of this Court is not limited to the constitutional question, but includes the whole case.

"But this Court has not found it necessary to pass upon the constitutional question, because it is of opinion that the contract is not within the statute set up by the defendant."

From these two cases it appears to follow: 1, That the Supreme Court has jurisdiction of a case in which it is claimed that a state law contravenes the United States Constitution, although there are other questions involved in the case, the determination of which may dispose of the case without requiring any decision upon the constitutional question; and, 2, That the Circuit Court of Appeals has no jurisdiction in such a case.

III.

The third question is:

"Does a record showing an instruction by the Circuit Court, directing a jury that the plaintiff is entitled to recover in his action under a state law upon which the plaintiff relies for recovery, to which instruction a general exception is reserved by the defendant, disclose a case in which it is claimed that the law of a state is in contravention of the Constitution of the United States within the meaning of Section 5 of the act of March 3d, 1891, where the record of the Circuit Court does not affirmatively show that any

issue as to the statute was raised by the pleadings, and where the record does not affirmatively show that said exception to said instruction was upon the ground that said statute was in contravention of the Constitution of the United States, or that the constitutionality of said statute was otherwise presented, or considered or passed upon by the Circuit Court?"

If this question is answered in the affirmative it will necessarily involve the answering of the fourth question propounded by the Circuit Court of Appeals in the negative, since the disclosure of such a case as is stated in the third question necessarily gives to this Court jurisdiction under Section 5, and deprives the Circuit Court of Appeals of exercising jurisdiction under Section 6 of the act of March 3d, 1891.

It is submitted that this question should be answered in the affirmative, although no direct authority is found upon the proposition, and for this reason: This Court has frequently held that it is proper for the Circuit Court to direct a verdict for the plaintiff where there is no question of fact for the jury, or where it is clear that he is entitled to recover, or where the evidence is undisputed, or is so conclusive that the Court would set aside a verdict returned in opposition to it, or where all the defenses relied upon involve questions of law only.

Robertson v. *Edelhoff*, 132 U. S., 614.
No. Pa. R. R. Co. v. *Com. Bk. of Chicago*, 123 U. S., 727.
Del. L. & W. R. R. Co. v. *Converse*, 139 U. S., 469.
Elliott v. *Chicago, M. & St. P. R. R. Co.*, 150 U. S., 245.
Ralls Co. v. *Douglass*, 105 U. S., 728.
Anderson Co. Com'rs. v. *Beal*, 113 U. S., 227.

The statement of facts accompanying the question certified shows that there was no dispute as to the facts of this case, and that the controversy turned upon the statute of Indiana, upon which the plaintiff below relied for recovery. This being so, the question presented to the Court, upon this phase of the case, as shown from the statement of facts, was whether or not, those facts being admitted and proved beyond doubt, the plaintiff was, as a matter of law, entitled to recover under the Indiana statute. Unless, in any view that might be taken of the Indiana statute, either as to its validity, or construction or otherwise, the facts shown entitled the plaintiff to re-

cover, the instruction to the jury that under the statute the plaintiff was entitled to recover would have been erroneous. Hence, a general exception by the defendant to such instruction, the facts being undisputed, raises the question as to the validity, construction, application and all other elements connected with the Indiana statute. In order to have the propriety of the instruction reviewed, the defendant was not obliged to state that he excepted because the Indiana statute was unconstitutional, or because it did not apply to the facts of this case, or to specify any other reason for this exception. Unless, in any view which might be taken of the statutes, the plaintiff was entitled to recover, the instruction was erroneous and, therefore, the question of the constitutionality of the statute is necessarily involved in the instruction of the Court.

This Court has frequently held under a somewhat analogous, though much stricter, provision in regard to the review of the decisions of the highest Court of a state on a writ of error, that it is not always necessary that the Federal question which gives this Court jurisdiction upon such review should appear affirmatively on the record or in the opinion of the state Court if an adjudication of such question was necessarily involved in the disposition of the case by the state Court.

Willson v. *Blackbird Creek Marsh Co.*, 2 Peters, 245.
Armstrong v. *Treasurer Athens Co.*, 16 Peters, 281.
Chicago Life Ins. Co. v. *Needles*, 113 U. S., 574.
Eureka Lake & Yuba C. Co. v. *Sup. Ct. of Y. Co.*, 116 U. S., 410.
N. O. Water Works v. *La. Sugar Co.*, 125 U. S., 18.
Wilmington R. R. Co. v. *Alsbrook*, 146 U. S., 279.
Mobile & O. R. R. Co. v. *Tennessee*, 153 U. S., 486.

So here in instructing the jury that the plaintiff was entitled to recover under the Indiana statute, while it does not affirmatively appear that the exception was based in whole or in part upon the claim that that act was unconstitutional, that must necessarily have been adjudicated by the Circuit Court when it charged that the defendant was liable under that act.

IV.

The fourth question certified is:

"If it be considered that such record in the Circuit Court does not disclose a case in which it is claimed that the law of a state is in contravention of the Constitution of the United States, but such claim is made, so far as the record shows, for the first time in the Circuit Court of Appeals, by assignment of error, and is insisted upon at the bar, has the Circuit of Appeals jurisdiction in error to hear and determine the constitutional question raised by such claim?"

The answer to this question appears to depend upon the view this Court may take of the right of a litigant to raise in the appellate court for the first time in the case a question of the constitutionality of a statute upon which a recovery was had in the trial Court. In the case at bar opposing counsel contends: 1, That the record shows no constitutional question dealt with, passed upon, or considered by the trial Court; and 2, That he nevertheless has the right to seek in the Circuit Court of Appeals a reversal of the judgment of the Circuit Court upon the ground that the statute upon which the judgment was based violated the Fourteenth Amendment of the Constitution of the United States.

We conceive that the contrary of each of these propositions is true. We have already attempted to show that on a record exhibiting an exception to a charge that the defendant was liable under a statute of a state, any reason in law why such statute should not impose liability may be submitted to the reviewing Court.

Passing this, however, our view is that the Circuit Court of Appeals is without power to consider such a question in the absence of a showing on the record that such question was determined by the Circuit Court. There either is or is not in the record a ruling of the Circuit Court upon the constitutionality of the state statute. If there is not in the record such a ruling, then there is nothing in the record on that point for the appellate court to consider, and no such question is presented to it for adjudication. If, however, such a record does contain such a ruling and the claim is made on such a record that the state law is in contravention of the Constitution of the United States, then

the case is within Section 5 of the Act of Congress, and the Supreme Court has sole jurisdiction.

If it were not so, then the provisions of Section 5, forbidding questions of this nature to be reviewed by any lesser tribunal than the Supreme Court, could in any statutory case be evaded. It would only be necessary for counsel to refrain from questioning in the Circuit Court the constitutionality of a statute involved and reserve the point for his assignment of errors and argument in the Circuit Court of Appeals. This is precisely what is attempted in the present case, and, as it seems to us, is guarded against by the phraseology of Section 5 of the act.

Whatever might have been the reason actuating Congress in singling out this particular class of constitutional questions for the exclusive consideration of this Court, whatever the motive that dictated the provision that in this particular class of constitutional questions, the mere claim made by a litigant in the case should at once stamp upon it its character as one for the exclusive consideration of this Court, certain it is that such purpose would be practically defeated and the validity of the Constitution and laws of the states would be subject to be passed upon, perhaps differently in different cases, by any one of the Circuit Courts of Appeals of the United States before whom the party assailing the state law or Constitution saw fit to first develop his attack.

As we view it this was not the intention, nor does the statute by its terms permit any such perversion. It seems to us that a litigant has his right to so try his case in the Circuit Court that the record will show what questions are preserved for review by the upper Court. If a claim that a state law is unconstitutional may legitimately be predicated upon such record he may carry his case to the Supreme Court; if not, and he makes no such claim in the case, he may go to the Circuit Court of Appeals. If, however, as in the case at bar, he, taking his chances whether or not his record will bear him out in his claim, does in fact carry the case to the Circuit Court of Appeals on a claim that the state law is unconstitutional, then that Court is without jurisdiction, for the fact that such claim is made in good faith in the case brings it within the provisions of Section 5 of the Act of Congress, and he must carry his case to the Supreme Court and

stand or fall there by his record. He can not present and urge such claim in the Circuit Court of Appeals without regard as to whether the record in the case contains the claim or not, and ask that the constitutional question be there decided, whether shown to have been decided by the trial Court or not. This is what is attempted in the case at bar, and we submit that if a party presents on error a claim in his case that a state law is in contravention of the Constitution of the United States, he thereby makes a case in which the Circuit Court of Appeals is without jurisdiction. Such a case must go to this Court, and if the Court find that the record justifies the presentation to a reviewing Court of such a claim then this Court will take the whole case. If the record does not justify the assignment of such a claim for error, then as long as that claim is persisted in neither this Court nor the Circuit Court of Appeals has jurisdiction, the former because the record does not disclose such an an issue before the trial Court, and the latter because the case is a case in which the claim is made that the law of a state is in contravention of the Federal Constitution.

All of which is respectfully submitted.

CHARLES M. CIST,
HARLAN CLEVELAND,
Counsel for Defendant in Error.

EDGAR W. CIST,
Of Counsel.

No. 259

Brief

OCT 8 1898

Supreme Court of the United States

OCTOBER TERM, 1898.

THE CHESAPEAKE, OHIO & SOUTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

E. P. THEBAUD, Administrator of C. Spurgeon, deceased,
Defendant in Error.

On a Certificate from the United States Circuit Court of Appeals for the Sixth Circuit.

Brief on Motion to Advance on the Docket.

CHARLES M. CIST,
Counsel for Defendant in Error.

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We submit that this case should be advanced on the docket for the reason that the question involved is of grave public importance, relating as it does to the power and authority of the Circuit Courts of Appeals of the United States to exercise jurisdiction over and to finally determine cases which require, for their proper adjudication, the interpretation of the Constitution of the United States.

The first and most important question certified is:

"Has the Circuit Court of Appeals jurisdiction of a writ of error to the Circuit Court in a case in which it is claimed

that a law of a state is in contravention of the Constitution of the United States, where the record presents other questions not involving the Constitution of the United States?"

The Circuit Courts of Appeals of the First, Third, Fourth, Fifth, Seventh and Eighth Circuits have held that they are without jurisdiction in such cases.

Wrightman v. *Boone Co.*, 88 Fed., 435.
Indianapolis v. *Trust Co.*, 83 Fed., 529.
Holt v. *Mfg. Co.*, 80 Fed., 1.
Hamilton v. *Brown*, 53 Fed., 753.
Green v. *Mills*, 69 Fed., 852.
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In *Wrightman* v. *Boone Co.*, 88 Fed., 435, which was a case in which it was claimed that a law of Arkansas was in contravention of the Constitution of the United States, the Circuit Court of Appeals say:

"Section 5 of the act of March 3d, 1891, 26 Stat,, 828, C. 517, declares that appeals may be taken to the Supreme Court (6) in any case in which the Constitution or law of a state is claimed to be in contravention of the Constitution of the United States. Section 6 provides that in cases other than those provided for in Section 5, the Circuit Court of Appeals may exercise appellate jurisdiction, unless otherwise provided for in Section 5, and consequently this Court has no jurisdiction of it. A careful examination of these sections of the act of Congress in *Hastings* v. *Ames*, 68 Fed., 726, and in *Pauley* v. *Crawford Co.*, 84 Fed., 942, led us to the conclusion that if it is claimed that a law of a state is void because it contravenes the Constitution of the United States, a Circuit Court of Appeals has no jurisdiction of the case, though it may involve the consideration of many other questions."

The Circuit Court of Appeals for the Sixth Circuit, however, exercises jurisdiction in cases brought before it of this character unless objection to the jurisdiction is specially interposed.

It is of public importance in the interest of uniformity in the administration of justice in the Circuit Courts of Appeals that this question of their jurisdiction should be speedily determined, especially as the question touches the power of those Courts to deal with and finally determine constitutional questions of the highest importance and frequently of the gravest public concern, which questions are particularly reserved by the Judiciary Act for the consideration of this Court. If the Circuit Courts of Appeals are without the power it would be seem of consequence to the public that the law should be so settled by this Court in order to prevent the diversity of practice from creating possible confusion and causing in some cases the loss of the remedy.

We have therefore moved the Court to advance this cause on the docket.

Respectfully submitted,

CHARLES M. CIST,

Counsel for Defendant in Error.